Nos. 15603 - 15604

In the

United States Court of Appeals

For the Ninth Circuit

CONVERSE TRUCKING SERVICE, a corporation and DONALD H. NOTEBOOM, *Appellants*,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO., a corporation, *Appellee.*

15603

SAMACK, INC., a corporation, *Appellant*,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO., a corporation, *Appellee.*

15604

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, *District Judge*

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Appeal from the United States District Court
for the District of Oregon
HONORABLE GUS J. SOLOMON, *District Judge*

JURISDICTION

This is an appeal from judgments of the United States District Court for the District of Oregon entered in two civil actions arising out of the same accident which were consolidated for trial. Plaintiff-Appellant, Converse Trucking Service, is a California corporation; Plaintiff-Appellant, Samack, Inc., is an

Oregon corporation, and Appellee, Pacific Intermountain Express Co., is a Nevada corporation. Donald H. Noteboom, third-party defendant and counterclaimant against Appellee, is a resident of the State of Oregon.

The parties as properly realigned for jurisdictional purposes are as follows:

In No. 15603 Noteboom, a resident of Oregon, and Converse Trucking Service, a California corporation, sought judgment against Appellee, a Nevada corporation. Appellee counterclaimed. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000. (R. 4).

In No. 15604 Samack, Inc., an Oregon corporation, sought judgment against Appellee, Pacific Intermountain Express Co., a Nevada corporation. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000. (R. 4).

The District Court had jurisdiction of these actions under 28 USCA § 1332 (a), and this court has jurisdiction of this appeal under 28 USCA § 1291.

QUESTIONS PRESENTED

(1) Is it prejudicial error to enter judgment based upon answers by the jury to special interrogatories when Appellants did not object to entry of the judg-

ment and claimed no error until interposing a motion for new trial?

(2) Is it prejudicial error to enter judgment for the defendant upon a special finding of the jury that the defendant's driver was not negligent where the trial court instructed the jury, without objection, that it could not find defendant's driver guilty of negligence unless plaintiff sustained its burden of proof with respect to that charge?

SUMMARY OF ARGUMENT

I.

There is before this Court for review no ruling of the trial court to which an objection was made. Appellants did not object to the entry of judgment based upon the jury's answers to the interrogatories submitted. The first time they raised this question was on a motion for new trial.

II.

The jury's findings that neither driver was negligent were based upon correct instructions given to the trial court with no objection by Appellants. The jury found that none of the parties had sustained the burden of proof.

ARGUMENT

I.

There is before this Court for review no ruling of the trial court to which an objection was made. Appellants did not object to the entry of judgment based upon the jury's answers to the interrogatories submitted. The first time they raised this question was on a motion for new trial.

Rule 46 of the Federal Rules of Civil Procedure provides:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Without an objection of some kind, and a ruling thereon, there is nothing before this court.

> "* * * It is a well-settled rule that alleged errors not brought to the attention of the trial court will not be considered on appeal. (citations). Designation of the ruling as error in the motion for a new trial does not cure the failure to make timely ob-

jection as this court, generally speaking, will not review the action of the trial court in ruling on a motion for a new trial. (citations)." *Schumacher vs. United States*, 216 Fed 2d 780 (8th Cir 1954).

In the case of *Walker vs. West Coast Fast Freight, Inc.*, 233 Fed 2d 939 (9th Cir 1956), this court rejected Appellants' assignments alleging that certain instructions of the trial court were erroneous when Appellants' counsel had made no objection in accordance with Rule 51. This court observed, at page 943:

"However, her attorney failed to raise these objections until the motion for a new trial."

In the case of *Reidy vs. Myntti, et al.*, 116 Fed 2d 725 (9th Cir 1940), it appeared that plaintiff contended on appeal to this court that the jury had returned an improper verdict based upon the trial court's instructions. The jury had been instructed that if plaintiff recovered at all she should be awarded interest from a certain date. The jury's verdict did not include any amount for interest. Plaintiff did not object to the entry of judgment at the time the verdict was returned. This court said at page 731:

"The question of the sufficiency of the jury's verdict was not raised by plaintiff until the trial court had discharged the jury. *Counsel did not request*

> *that the jury make the verdict more definite. The judgment of the court is in conformity with the verdict, as rendered. If counsel for plaintiff wished to question the verdict as conforming to the court's instructions, he should have raised that question at the time of its rendition.*" (Emphasis added)

To the same effect see *Pet Milk Co. vs. Boland*, 185 Fed 2d 298, (8th Cir 1950) at page 302.

In the case of *Ditter vs. Yellow Cab Company*, 221 Fed 2d 894 (7th Cir 1955), defendant did not object to certain instructions until making a motion for new trial. The court held:

> "Both of these objections came too late to be considered on this appeal."

The record in this case does not disclose any objection on the part of Appellants to the entry of judgment based upon the jury's answers to the interrogatories. The trial court, upon receiving the verdict, had a duty to enter judgment the same day. (Rule 58, Federal Rules of Civil Procedure).

Appellants find themselves in this court challenging a purported ruling of the trial court to which no timely objection was made. Consequently, they have nothing to support an appeal and the judgment of the trial court must be affirmed.

II.

The jury's findings that neither driver was negligent were based upon correct instructions given to the trial court with no objection by Appellants. The jury found that none of the parties had sustained the burden of proof.

Both parties agreed at the trial that a head-on collision occurred between Appellants' and Appellee's trucks. The trial court instructed the jury without objection:

> "I think both counsel have told you that the real crux of this problem is who was on the wrong side of the road." (R. 177)

The court then told the jury that in the first instance Appellants had a burden of proving that Appellee was guilty of negligence by a preponderance of the evidence. (R. 180).

The court then instructed the jury: (the driver of Appellee's truck and trailer was Sherman E. Clancy.)

> "In this case, therefore, if the evidence on the guilt of Sherman E. Clancy is evenly matched or inclines toward the position asserted by the defendant Pacific Intermountain Express Company, you must answer that interrogatory in the negative. That is, you must answer it 'No'.
>
> "The plaintiff must prove by a preponderance of the evidence that he was negligent in order to

answer that question in the affirmative. But that's not true, as far as the interrogatory which reads, 'Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?' If the evidence is evenly balanced on that, you would also answer that in the negative, because on that one the defendant would have the burden of proof.

"Now, the second set of questions is almost identical to the first set of questions, but it relates to the conduct of the defendant Donald H. Noteboom.

"In other words, the second set of questions relates to the claim of the Pacific Intermountain Express Company [184] against the Converse Trucking Company, and the first question is, 'Was Donald H. Noteboom, the driver of Converse Trucking Service's truck and trailer, guilty of negligence?' And on this allegation, the Pacific Intermountain Express Company has the burden of proof. And the same rules that I laid down for you in connection with the first set of questions are equally applicable here.

"Then the next one is, 'Was Sherman E. Clancy guilty of negligence which caused or contributed to the accident?' On that one, the Converse Trucking Company has the burden of proof."

It is obvious from the foregoing instructions and the answers to the interrogatories that the jury could not decide which truck was on the wrong side of the road. Under the instructions above set out it was authorized and directed to answer the interrogatories in the manner that it did.

Appellants' own brief answers their contention on this appeal. They state: (page 12 Appellants Br.)

> "It might be argued in opposition to this proposition that either or both sides had failed to carry the burden of proof, but we submit that this is simply not the situation. In the present case the jury made affirmative findings that neither driver was negligent. This is not a situation wherein the jury is unable to make an affirmative finding and leaves the answer to the question blank. Had this occurred, then it would have been apparent that one or both sides had failed to carry their respective burdens of proof."

The jury was not advised to leave any answers blank, and was specifically instructed that if it could not decide who had carried the burden of proof, the crucial questions should be answered "no". This it did—faithfully following the court's instructions.

> "* * * the rule must be borne in mind that every reasonable intendment must be indulged in to support a verdict; in other words, the two findings must be in irreconcilable conflict before they may be set aside. (citing authorities)" *Flusk vs. Erie R. Co.*, 110 F. Supp. 118 (D.C. N.J. 1953) at page 120.

It has been said that answers to special interrogatories by a jury are superior to the traditional general verdict, because the court and counsel can then

find out what the jury decided. See Judge Frank's opinion in *Skidmore vs. Baltimore & O. R. Co.*, 167 Fed 2d 54 (2d Cir 1948). It is crystal clear that here the jury could not decide who was at fault.

Under the law of Oregon and elsewhere, the jury is compelled to find against the party who fails to sustain the burden of proof imposed upon him. An instructive statement relating to the jury's function in connection with problems of burden of proof appears in *Lampe vs. Franklin American Trust Co.*, 339 Mo. 361; 96 S.W. 2d 710; 107 ALR 465 (1936), where the court said:

> "If, as to the truth of essential facts, the evidence of the party having the burden of proof is not accepted by the jury as credible over the evidence to the contrary, he is not entitled to have a verdict. (citing authority). In other words, if the jury cannot make up their minds whether to believe or not to believe that facts essential to a parties' case or affirmative defense are true, then as to such issue they must find for the opposite party. They must not attempt to base a verdict upon what facts may be 'more probable', if they cannot decide what facts are true."

The Oregon Supreme Court has said:

> "A special verdict will be construed most strongly against the party upon whom rests the burden of proof, and *a special finding received without*

objection most strongly against the party in whose favor it is found: (citing authorities)". *Forest Products Co., Inc. vs. Dant & Russell, Inc.*, 117 Or 637; 244 Pac 531 (1926). (emphasis added)

Cole vs. Fogel, et al., 210 Or 257; 310 P 2d 315 (1957), was an equity case which was tried without a jury. The trial court had ruled that neither side had sustained the burden of proof, and that this compelled a finding for the defendant. The Supreme Court of Oregon affirmed with a slight modification not material here, and said:

> "Further enumeration of the conflicts would be pointless, as enough has been said to show that this Court, from the cold record, cannot determine which party is telling the truth. The trial court apparently experienced the same difficulty, even with the advantage of seeing and hearing the witnesses.

In his opinion, the late Judge Kimmell said:

> '* * * The court has carefully considered the evidence and as a result is of the opinion that neither the plaintiff nor the defendants have sustained the burden of proof incumbent upon them. It follows that both the prayer of the complaint and the prayer of the cross complaint will be denied.' "

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'* * * The court has carefully considered the evidence and as a result is of the opinion that neither the plaintiff nor the defendants have sustained the burden of proof incumbent upon them. It follows that both the prayer of the complaint and the prayer of the cross complaint will be denied.' "

A decision almost exactly in point with the instant case is *Halprin vs. Mora,* 231 Fed 2d 197 (3rd Cir 1956), which concerned a head-on collision between two motor vehicles. In answer to special interrogatories the jury answered that neither driver was negligent. Stating the issue presented the court said at page 198:

> "* * * First, according to plaintiff, the jury's conclusion that neither defendant nor third-party defendant was negligent was manifestly unreasonable on any view of the evidence.
>
> "The only eye-witnesses who testified as to the manner in which the collision occurred were the defendant Mora and the third-party defendant Davis. Plaintiff analyzes this testimony and concludes that defendant Mora's testimony clearly showed that third-party defendant Davis was negligent and that Davis' version of the accident just as clearly indicates that Mora was negligent. Thus, says plaintiff, no matter who the jury believed, it could not reasonably have found that neither driver had been negligent."

The court affirmed a judgment for defendants. The court observed: (page 198)

> "The district court in denying the motion for a new trial pointed out that in essential aspects the jury could have reconciled Mora's testimony with Davis' *and found that the plaintiff had failed to sustain the burden of proof.*" (emphasis added)

Another case closely in point was *Ingersoll vs. Mason*, 155 F Supp 497 (D.C.W.D. Ark. 1957), except that the jury found that both drivers were negligent. From the evidence it appeared that the jury should probably have found one or the other but not both negligent. The plaintiff had made a left turn in front of the defendant. The plaintiff testified that he had turned left successfully and was completely on his left shoulder of the highway, but the on-coming defendant swerved to the right, causing the collision. The defendant testified that plaintiff abruptly turned in front of him. The court said:

> "As is usual in cases of this kind, the evidence as to how the accident occurred and as to who was to blame was sharply conflicting, and we are satisfied that the jury's findings that the accident was proximately caused by the joint and concurrent negligence of plaintiff and of James Mason were amply supported by the evidence."

See also *Jackson vs. King*, 223 Fed 2d 714 (5th Cir 1955), which was an action against the Collector of Internal Revenue to recover taxes plaintiff claimed were erroneously collected. The issue was whether certain houses sold by the taxpayer had been held for investment so as to be capital assets or, as the Collector contended, were held for sale to customers in the

ordinary course of business so that profits would constitute ordinary income. The trial court submitted interrogatories to the jury inquiring whether the houses had been held as capital assets or for sale to customers. The jury answered that the houses were held for investment and judgment was entered for the taxpayer. The Collector appealed. The Court of Appeals reversed because of improper instructions to the jury saying, in part:

> "* * * In importing that the jury should find that the property was held for rental purposes or, in the alternative, that it was held for sale to customers in the ordinary course of business, *the instructions did not make it clear that the jury could choose to make neither finding, and that the defendants should prevail if the evidence was so much in equipoise that the jury was left in doubt.*" (emphasis added)

The above authorities demonstrate that the jury properly followed the trial court's instructions which were given without any objections on the part of Appellant. Based upon the evidence and issues submitted, the answers to the interrogatories were consistent and support the judgment for Appellee.

The cases discussed by Appellants are not in point and do not support their position. Those cases say that answers to special interrogatories on particular facts

can be fatally inconsistent when the jury gives *two different answers to the same question.* Thus in the case of *Mounger vs. Wells,* 30 Fed 2d 521 (5th Cir 1929), the jury found that a business transaction was *both* illegal as constituting a gambling venture and a legitimate transaction. This, of course, is an irreconcilable conflict.

In the case of *Willis vs. Skinner, et al.,* 89 Kan 145; 130 Pac 673 (1913), relied on by Appellants, the plaintiff was injured through the alleged negligence of his employer. The jury returned a general verdict for the plaintiff and, in addition, answered some special interrogatories. The jury said the defendant was negligent in failing to supply sufficient help to the plaintiff and, in answer to another question, said that plaintiff's fellow employee and helper could have prevented the accident. The court held that these findings were fatally inconsistent and could not support a plaintiff's verdict because they found the employer both negligent and not negligent.

In the case of *McGuire vs. McGuire,* 152 Kan 237; 103 P 2d 884 (1940), also relied upon by Appellants, the jury returned a general verdict for the plaintiff and, in answer to special interrogatories, found defendants negligent, and also found that the accident was

unavoidable. The jury had been instructed that if the accident was unavoidable it should find for the defendants. The court correctly held that these answers were fatally irreconcilable with the general verdict because they found negligence and also no negligence on the same facts.

In the case of *Packer vs. Fairmont Creamery Co., et al.* 158 Kan 191, 146 P 2d 401 (1944), the court interpreted answers to special interrogatories to mean that the defendant was negligent but that the proximate cause of the accident was the conduct of the driver of the automobile in which plaintiff was a passenger. The court held that these would not support a verdict for the plaintiff and ordered a new trial.

In the case of *King vs. Vets Cab,* 179 Kan 379, 295 P 2d 605 (1956), the jury returned a general verdict for the plaintiff but, in answer to special interrogatories found that the plaintiff was probably guilty of contributory negligence. Actually, the finding on contributory negligence was ambiguous and it was impossible to tell what the jury thought. The court reversed a judgment for the plaintiff and ordered a new trial saying that the possible finding of contributory negligence was inconsistent with the general verdict for the plaintiff. So, also, in the case of *Huling vs. Seccombe, et al.* 88 Cal App 238; 263 Pac 362, the

court held that findings of the trial court which found the allegations of both the complaint and an answer and counterclaim to be true in a quiet title suit to be fatally inconsistent since both could not, as a matter of law be true.

Each of these cases relied upon by Appellants is clearly distinguishable because the jury, or fact finder, answered the same question both "yes" and "no". This is not true in the instant case where the jury said that neither driver was negligent. We have demonstrated that these findings were warranted based on issues and instructions in the case.

The jury's answers to the interrogatories were consistent and as a matter of law support the judgment for Appellee.

CONCLUSION

Appellants' claim that the trial court erred in entering a judgment for Appellee based upon the jury's answers to the interrogatories is not before this court for review since Appellants did not object to the entry of judgment until making their motion for a new trial. Such an objection was too late and presents no question for decision by this court.

The answers to the interrogatories were not inconsistent based upon the issues and the instructions. The

jury was instructed without objection that if neither party proved by preponderance of the evidence that the other was negligent that it should find neither negligent. The jury followed these instructions in answering the interrogatories and the judgment based thereon in favor of Appellee was correct and proper.

The trial court must be affirmed.

Respectfully submitted,

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